

No. 10-16645

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

The United States of America,

Plaintiff-Appellee,

v.

**The State of Arizona; and Janice K. Brewer,
Governor of the State of Arizona, in her official
capacity,**

Defendants-Appellants.

D.C. CASE #

CV 10-1413-PHX-SRB

**MOTION BY MARICOPA COUNTY SHERIFF JOSEPH M. ARPAIO FOR
LEAVE TO FILE *AMICUS CURIAE* BRIEF**

MARICOPA COUNTY
OFFICE OF SPECIAL LITIGATION SERVICES
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Joseph M. Arpaio

Joseph M. Arpaio, Maricopa County Sheriff, in his official capacity, pursuant to Rule 29 of the Federal Rules of Appellate Procedure, by and through counsel undersigned, hereby respectfully requests that this Court permit him to file a brief as *Amicus Curiae* in this case, attached as Exhibit A. It is appropriate to grant this motion and accept this brief as Sheriff Arpaio and his deputies must administer the legislative act, known as “SB 1070,” that is the subject matter of this action.

Sheriff Arpaio is the Sheriff of Maricopa County, by far the largest county in Arizona both in land area and population. As of July 2008, the population of Maricopa County was 3,954,598 which ranks fourth among the nation’s counties and is greater than the population of 24 states. Maricopa County encompasses more than half of the State’s residents. Maricopa County contains the State’s largest city and capital, Phoenix. Maricopa County is a destination and distribution center for the human smuggling corridor through the border counties and Tucson. Phoenix has been famously reported to be the kidnapping capital of the United States, number two in the world, second only to Mexico City.

Sheriff Arpaio is serving his fifth elected term as Sheriff of Maricopa County and has taken a strong leadership role in resolving the issues relating to the border and immigration. He has been vocal on these issues locally, state-wide and nationally. Since 1992, when Sheriff Arpaio was elected to his first term as

Maricopa County Sheriff, he has been a leader on illegal immigration and related issues, including human and drug smuggling. No party is more familiar than Sheriff Arpaio with law enforcement procedures related to illegal immigration and the law enforcement procedures that will be followed if SB 1070 is implemented and enforced. *See* A.R.S. §11-441(a)(2).

Sheriff Arpaio is a Defendant in a related matter, *Friendly House et al. v. Whiting et al.*, CV10-01061.

RESPECTFULLY SUBMITTED this 26th day of August, 2010.

MARICOPA COUNTY
OFFICE OF SPECIAL LITIGATION SERVICES

BY: /s/ Thomas P. Liddy
THOMAS P. LIDDY
MARIA R. BRANDON
Attorneys for *Amicus Curiae* Joseph M. Arpaio

CERTIFICATE OF SERVICE

I hereby certify that on August 26th, 2010, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the Appellate CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all registered CM/ECF participants and parties hereto. Service is accomplished thru the Appellate CM/ECF system.

/s/ Thomas P. Liddy
Attorney for *Amicus Curiae*
Joseph M. Arpaio

Exhibit A

Brief

No. 10-16645

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AMICUS CURIAE BRIEF OF SHERIFF ARPAIO

**MARICOPA COUNTY
OFFICE OF SPECIAL LITIGATION
SERVICES**

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Table of Contents

Table of Contents	i
Table of Authorities	ii
Jurisdictional Statement	1
Issue Presented for Review	1
Statement of the Case	1
Summary	2
Argument.....	3
Conclusion.....	9
Certificate of Compliance	10
Certificate of Service.....	11

Table of Authorities

Cases

<i>California v. ARC Am. Corp.</i> , 490 U.S. 93, 100-01, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86 (1989))	4
<i>Chicanos Por La Causa, Inc. v. Napolitano</i> , 558 F.3d 856, 863 (9th Cir. 2009), cert. granted, 130 S.Ct. 3498, 78 USLW 3065 (June 28, 2010).....	3
<i>City of San Jose v. Dep’t of Health Serv.</i> , 66 Cal.App.4th 35, 77 Cal.Rptr.2d 609 (1998)	8
<i>Incalza v. Fendi North American, Inc.</i> , 479 F.3d 1005, 1010 (9th Cir. 2007)	4
<i>Keams v. Tempe Technical Inst.</i> , 39 F.3d 222, 225 (9th Cir.1994).....	4
<i>Kobar ex rel Kobar v. Novartis Corp.</i> , 378 F.Supp.2d 1166, 1169 (D.Ariz.,2005).....	3
<i>Total T.V. v. Palmer Communications, Inc.</i> , 69 F.3d 298, 304 (9th Cir. 1995)	4

Statutes

A.R.S. § 11-1051(A)-(L)	5
A.R.S. § 11-1051(B).....	1, 2, 9
A.R.S. § 11-1509	1, 2, 9
A.R.S. § 13-1509	6
A.R.S. § 13-1509(A).....	6
A.R.S. § 13-1509(F)	6
A.R.S. § 13-2928(C).....	1, 2, 9
A.R.S. § 13-3883(A).....	6
A.R.S. § 13-3883(A)(5).....	1, 2, 9

Constitutional Provisions

28 U.S.C. § 1291	1
8 U.S.C. § 1252c(a)	8
8 U.S.C. § 1304(e)	6, 8
8 U.S.C. § 1306(a)	6
8 U.S.C. § 1357(g).....	8
8 U.S.C. § 1373(c)	6

Jurisdictional Statement

This is an appeal from an Order granting, in part, the Motion for Preliminary Injunction filed by the Plaintiff-Appellee, the United States, issuing a preliminary injunction enjoining the enforcement of the portion of Section 2 creating A.R.S. § 11-1051(B); Section 3 creating A.R.S. § 11-1509; the portion of section 5 creating A.R.S. § 13-2928(C); and Section 6 creating A.R.S. § 13-3883(A)(5). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Issue Presented for Review

Whether the District Court erred when it found that the United States was likely to succeed on the merits and imposed a preliminary injunction enjoining the State of Arizona and law enforcement personnel from the several counties from enforcing some of the laws created or amended by SB 1070?

Statement of the Case

This is an appeal, brought by Defendant State of Arizona and Janice K. Brewer, Governor of the State of Arizona, of a ruling granting, in part, a Motion for Preliminary Injunction filed by Plaintiff, the United States.

Plaintiff sought to enjoin Sections 1-6 of the “Support Our Law Enforcement and Safe Neighborhoods Act,” as amended (“SB 1070”) on the grounds that these sections allegedly violate the Supremacy Clause of the United States Constitution

and that Section 5 also violates the Commerce Clause.

The United States District Court granted Plaintiff's motion, in part, and issued a partial preliminary injunction enjoining the enforcement of the portions of Section 2 creating A.R.S. § 11-1051(B), Section 3 creating A.R.S. § 11-1509, the portion of section 5 creating A.R.S. § 13-2928(C), and Section 6 creating A.R.S. § 13-3883(A)(5).

Summary

Plaintiff-Appellee takes the position that the "Support Our Law Enforcement and Safe Neighborhoods Act" ("SB 1070") is unconstitutional in its entirety, that the United States is likely to prevail on the merits of the litigation and, therefore, that the partial preliminary injunction enjoining the enforcement of the portions of Section 2, creating A.R.S. § 11-1051(B); Section 3, creating A.R.S. § 11-1509; the portion of Section 5, creating A.R.S. § 13-2928(C); and Section 6, creating A.R.S. § 13-3883(A)(5), should be upheld. The Plaintiff-Appellee took the position in the District Court that the Court should enjoin the remainder of SB 1070.

Sheriff Arpaio takes the position that SB1070 is constitutional in its entirety and that the United States is not likely to prevail on the merits of the litigation and the partial preliminary injunction should be reversed. SB 1070 does not conflict with federal immigration law as enacted by the United States Congress and signed

into law by the president. When analyzing SB 1070 for the purpose of determining whether to apply the preemption doctrine, the Court must examine the federal immigration laws as enacted by the Congress, and not the enforcement policies or political priorities of any particular chief executive. A “hypothetical conflict” is not sufficient to successfully establish conflict preemption. Plaintiff-Appellee has failed to meet its burden.

Argument

SB 1070 is not preempted by the Supremacy Clause

The United States must demonstrate that the challenged provisions of SB 1070 (1) purport to regulate immigration; (2) legislate in a federally-occupied field; or (3) conflict with federal law in order to successfully establish its claim for implied preemption, *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009), *cert. granted*, 130 S.Ct. 3498, 78 USLW 3065 (June 28, 2010). State laws are preempted if it appears that Congress “intended to occupy the entire field, leaving no room for the operation of state law.” Even if that is not so, [courts] infer preemption ... if compliance with both state and federal law would be impossible, or state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Kobar ex rel Kobar v. Novartis Corp.*, 378 F.Supp.2d 1166, 1169 (D.Ariz.,2005) (quoting *Keams v.*

Tempe Technical Inst., 39 F.3d 222, 225 (9th Cir.1994) (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 100-01, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86 (1989)).

A “hypothetical conflict is not a sufficient basis for preemption.” *Incalza v. Fendi North American, Inc.*, 479 F.3d 1005, 1010 (9th Cir. 2007) (quoting *Total T.V. v. Palmer Communications, Inc.*, 69 F.3d 298, 304 (9th Cir. 1995)). When analyzing SB 1070 for the purpose of determining whether to apply the preemption doctrine, the Court must examine the federal immigration laws as enacted by the Congress, and not the enforcement policies or political priorities of any particular chief executive. Plaintiff-Appellee has failed to meet its burden.

Moreover, Plaintiff-Appellee’s argument that this Arizona law conflicts with federal law in seeking to regulate the field of immigration law enforcement which Congress has plainly intended to occupy is undercut by the argument that Section 3 creates a misdemeanor for not carrying certain immigration papers based on an arcane federal immigration provision. Simply put, federal *policy* seems to conflict of late with federal statutes, or rather Congress’ laws may be considered “arcane” by some in the Executive Branch.

It is noteworthy that recently a memorandum created by the U.S. Citizenship and Immigration Services addressed to the Director, Alejandro N. Mayorkas, from Denis Vanison, Roxana Bacon, Debra Rogers and Donald Neufeld of the Office of

Chief Counsel has been published on the subject of “Administrative Alternatives to Comprehensive Immigration Reform.” (Addendum, Exhibit 1) This Memorandum suggests that immigration reform may be handled by means other than Congress and raises a question as to exactly what constitutes the federal immigration law scheme. Federal immigration law appears to be a patchwork of conflicting agencies and branches of government with no clearly defined approach. Therefore, this patchwork should not preempt the field of immigration law and trump the clear public will of the State of Arizona’s legislature, which is composed of the peoples’ representatives, not appointed employees.

A. Section 1- State Legislature’s Intent to Regulate Immigration is Not Preempted.

The federal government cannot preempt an “intention” of a state legislature and, therefore, the District court was correct in not preempting Section 1.

B. Sections 2, 3, and 6- State “Immigration Enforcement” is Not Preempted.

Section 2 of SB 1070 has twelve subsections. *See* A.R.S. § 11-1051(A)-(L). Plaintiff purports to challenge all of Section 2, but addresses only a portion thereof. Plaintiff asserts that Section 2 attempts to authorize local law enforcement officers with the power to determine the immigration status of any person who is arrested.

(C.R. 28 at 8, lines 19-22). This assertion is false. SB 1070 expressly calls for local law enforcement to notify the federal government and request a determination in compliance with federal law, “the person’s immigration status shall be verified with the federal government pursuant to 8 U.S.C. § 1373(c).” S.B. 1070, Sec. 2(b). Plaintiff –Appellee places itself in the absurd position of claiming that SB 1070 conflicts with federal law because it mandates local law enforcement to act in compliance with federal law.

Section 3 of SB 1070 mirrors federal law: “In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 U.S.C. §§ 1304(e) or 1306(a).” A.R.S. § 13-1509(A). Moreover, A.R.S. § 13-1509 mirrors federal law by imposing the same misdemeanor penalties as federal law for violations of 8 U.S.C. § 1304(e). S.B. 1070 expressly “does not apply to a person who maintains authorization from the federal government to remain in the United States.” A.R.S. § 13-1509(F).

Section 6 of SB 1070 adds to the authority of law enforcement officers in Arizona under A.R.S. § 13-3883(A) to arrest a person without a warrant by authorizing such arrests when “the officer has probable cause to believe . . . [t]he person to be arrested has committed any public offense that makes the person

removable from the United States.” Section 6 does not authorize Arizona law enforcement officers, or any part of the state government, to determine whether any person is removable. That authority is expressly reserved for the federal government.

Perhaps the best demonstration of the fact that federal government has not preempted the field of immigration enforcement is the infamous signs posted by the federal government in Southern Arizona warning people to beware of the dangers of illegal immigrants in the desert and then instructing them to call “911” rather than approach the illegal immigrants themselves. A call to “911” is a call to local law enforcement. Thus, the federal government has admitted that they are relying on local law enforcement to enforce immigration laws.

C. INA Section 287 (g) Does Not Demonstrate that Congress Has Occupied the Field of Immigration Law Enforcement.

Section 287 (g) sets forth a scheme for cooperation and collectivism in its approach to immigration law enforcement, not preemption. Furthermore, if the United States were sincere about its concern for individual states and other political subdivisions creating their own quilt panels in a “patchwork” of immigration enforcement schemes, they would have contested the several “sanctuary cities” that flout federal immigration law each and every day. With

“sanctuary city” resolutions, municipalities openly flaunt their disagreement with federal immigration laws which require visitors and immigrants to obtain federal permission to enter the United States and to keep documentation of his or her legal status on his or her person. *See* 8 U.S.C. §§ 1252c(a), 1304(e), and 1357(g). *See also, San Francisco Admin. Order*, 12H Secs. 1-6.

D. Sections 5,7,9 State’s New Crimes Re Immigrant Workers are Not Preempted.

Sections 5, 7, and 9 of SB 1070 set forth new crimes concerning immigrant workers. With regard to these new crimes, there is no federal preemption as the fields of employment, health, and safety have been traditional areas of state law. *See generally, City of San Jose v. Dep’t of Health Serv.*, 66 Cal.App.4th 35, 77 Cal.Rptr.2d 609 (1998).

E. Section 10- State’s New Crimes for Transportation and Harboring are Not Preempted.

The State’s so-called new crimes for transportation and harboring of illegal immigrants do not involve illegal immigrants; they pertain to citizens and those with legal status. Therefore, these laws cannot be preempted unless the federal government is somehow seeking to establish that the states are no longer able to pass criminal laws of their choosing.

Conclusion

This Court should reverse the findings of the District Court that the United States is likely to prevail on some of its claims and lift the partial preliminary injunction enjoining the enforcement of the portions of Section 2 creating A.R.S. § 11-1051(B), Section 3 creating A.R.S. § 11-1509, the portion of Section 5 creating A.R.S. § 13-2928(C), and Section 6 creating A.R.S. § 13-3883(A)(5).

Certificate of Compliance

Pursuant to Fed.R.App.P. 32(a)(7)(C), and Ninth Circuit Rule 32-1, I certify that this Amicus Curiae Brief is proportionately spaced, has a typeface of 14 points or more and contains 1761 words (according to the word count feature Microsoft Word, excluding the tables, the statement of related cases and this certificate.)

Dated this 26th day of August, 2010.

MARICOPA COUNTY
OFFICE OF SPECIAL LITIGATION SERVICES

/s/Thomas P. Liddy
THOMAS P. LIDDY
Senior Litigation Attorney

Certificate of Service

When all case participants are registered for the appellate CM/ECF System:

I hereby certify that on August 26, 2010, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Thomas P. Liddy
THOMAS P. LIDDY
Senior Litigation Attorney

When NOT all case participants are registered for the appellate CM/ECF System:

I hereby certify that on August 26, 2010, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

NONE.

/s/ Thomas P. Liddy
THOMAS P. LIDDY
Senior Litigation Attorney

Addendum

Exhibit 1

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Helping People Become U.S. Citizens
Washington, DC 20535-0001



U.S. Citizenship
and Immigration
Services

Memorandum

TO: Alejandro N. Mayorkas, Director

FROM: Denise A. Vanison, Policy and Strategy
Roxana Bacon, Office of the Chief Counsel
Debra A. Rogers, Field Operations
Donald Neufeld, Service Center Operations

SUBJECT: Administrative Alternatives to Comprehensive Immigration Reform

I. Purpose

This memorandum offers administrative relief options to promote family unity, foster economic growth, achieve significant process improvements and reduce the threat of removal for certain individuals present in the United States without authorization. It includes recommendations regarding implementation timeframes and required resources.

II. Summary

In the absence of Comprehensive Immigration Reform, USCIS can extend benefits and/or protections to many individuals and groups by issuing new guidance and regulations, exercising discretion with regard to parole-in-place, deferred action and the issuance of Notices to Appear (NTA), and adopting significant process improvements.

To promote family unity, USCIS could reinterpret two 1990 General Counsel Opinions regarding the ability of Temporary Protected Status (TPS) applicants who entered the United States (U.S.) without inspection to adjust or change status. This would enable thousands of individuals in TPS status to become lawful permanent residents. Similarly, where non-TPS applicants have been deemed inadmissible under section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("the Act") for having entered without inspection, USCIS could grant "parole-in-place" (PIP) in the exercise of discretion to create a basis for adjustment in the U.S.

DRAFT — Immigration Administrative Relief Options
Page 2

To foster economic growth, USCIS could work more aggressively with the Department of Commerce (DOC) to complement important economic initiatives such as *Invest in America*. By establishing a working group with the DOC, USCIS should consider creative ways to make the EB-5 program more accessible to foreign investors and to administer it.

For workers in the U.S. whose occupations require frequent travel, or who are seeking permanent residence, USCIS could also build on a regulation issued by the former INS that, among other things, relieved H and L non-immigrants with pending adjustment applications from having to secure advance parole before departing the U.S. Expanding this "dual intent" concept to cover other long-term non-immigrants, including F, O, TN, P, and E visa holders would enable these workers to maintain valid nonimmigrant status and travel overseas without advance parole while their adjustment applications are pending. They would also be allowed to maintain their nonimmigrant status if USCIS denies their adjustment applications. The agency could also consider extending employment authorization to the dependent spouses of certain skilled workers. For example, USCIS could allow employment authorization for H-4 dependent spouses of H-1B principals where the principals are also applicants for lawful permanent residence and have extended their nonimmigrant status under the provisions of AC21. Finally, the agency should afford workers admitted to the U.S. in nonimmigrant status a reasonable period of time to conclude their affairs and depart after expiration of their authorized period of employment, performance, training, or vocational activity. The current 10-day "grace period" is insufficient. USCIS could amend its regulations to permit longer periods ranging from 45 to 90 days depending on employment category and overall time spent working in the U.S.

Where no relief appears available based on an applicant's employment and/or family circumstances, but removal is not in the public interest, USCIS could grant deferred action. This would permit individuals for whom relief may become available in the future to live and work in the U.S. without fear of removal. A corollary to this exercise of agency discretion is for USCIS to issue Notices to Appear (NTAs) strategically, rather than across the board. If relief is potentially available in removal, USCIS should consider issuing an NTA. On the other hand, where no relief exists in removal for an applicant without any significant negative immigration or criminal history, USCIS could avoid using its limited resources to issue an NTA.

Finally, for applicants who have requested relief from USCIS, whether in-country or abroad, and whose applications require a waiver of inadmissibility, USCIS could issue guidance or a regulation lessening the "extreme hardship" standard. This would encourage many more spouses, sons and daughters of U.S. citizens and lawful permanent residents to seek relief without fear of removal. It would also increase the likelihood that such relief would be granted.

II. Options

The following options - used alone or in combination - have the potential to result in meaningful immigration reform absent legislative action. Each requires the development of specific written guidance and/or regulatory language, implementation protocols, outreach and training within USCIS and coordination among Department of Homeland Security (DHS) immigration components.

DRAFT – Immigration Administrative Relief Options
Page 3

A. To Promote Family Unity

1. Allow TPS Applicants Who Entered without Inspection to Adjust or Change Status

Individuals in TPS continue to be deemed ineligible to adjust or change status in the U.S. based on legal opinions rendered in the early 1990s by a General Counsel of the former Immigration and Naturalization Service (INS). Given the current definition of “admission” in section 101(a)(13)(A) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1101(a)(13)(A), the USCIS Chief Counsel has expressed her view that these legal opinions no longer reflect a correct interpretation of the statute. See *January 14, 2010 Memorandum from Roxana Bacon, Chief Counsel, to David Martin, Principal Deputy Counsel (attached)*.

Thus, USCIS should no longer adhere to the 1990 General Counsel opinions, and instead permit individuals in TPS to adjust or change status. Opening this pathway will help thousands of applicants obtain lawful permanent residence without having to leave the U.S.

The SPC is poised to review this issue in May. Depending on its final decision, implementation of this option could begin immediately following the development of written field guidance and an external communication plan. Rather than imposing any additional financial cost, allowing TPS applicants to adjust or change status will increase USCIS revenue in the form of fee receipts. While initial outreach related to the implementation of field guidance may require dedicating staff/resources, this would likely be a short-term need. Actual adjudication of new applications and petitions could be handled by field offices already experiencing lower than normal receipts.

2. Expand the Use of Parole-in-Place

USCIS has the discretionary authority under section 212(d)(5)(A) of the Act to parole into the U.S. on a case-by-case basis for “urgent humanitarian reasons” or “significant public benefit” any applicant for admission. Section 235(a)(1) of the Act provides that an alien present in the U.S. who has not been admitted shall be deemed an applicant for admission. Granting parole to aliens in the U.S. who have not been admitted or paroled is commonly referred to as “parole-in-place” (PIP).¹

By granting PIP, USCIS can eliminate the need for qualified recipients to return to their home country for consular processing, particularly when doing so might trigger a bar to returning. For years, USCIS has used PIP on a very limited basis. Last month, however, the SPC approved the broader use of PIP for qualified military dependents to:

¹ Individuals who were lawfully admitted to the United States but whose authorized period of admission is about to expire or has expired are not eligible for parole-in-place.

DRAFT -- Immigration Administrative Relief Options
Page 4

- Preserve family unity and address Department of Defense concerns regarding soldier safety and readiness for duty.
- Avoid the need for spouses and children of active duty military service members to depart the U.S. and wait in foreign, often very dangerous jurisdictions for consulate processing, and
- Enable these same individuals to remain on military installations in the U.S. where they can receive housing, medical and dental, and other support services based on the active duty service member's status.

Other individuals/groups amenable to PIP include applicants for admission who entered the U.S. as minors without inspection, and whose return to their home country for consular processing would impose an extreme hardship on qualified family members. By statute, such family members include a U.S. citizen or lawful permanent resident parent, spouse, son or daughter. For example, where the applicant is the spouse of a U.S. citizen and also the primary caretaker of a disabled child or children, PIP could be used to enable adjustment in the U.S. Other applicants, including those who are elderly or who have lived for many years in the U.S., and for whom consular processing would impose a formidable financial burden, could likewise be granted PIP.

In terms of implementation costs and required resources, although PIP has been granted by USCIS without requiring the filing of any form or fee, the agency should alter this approach for wider use. The Form I-131, Application for Travel Document, presents the most logical application and presently involves a mandatory filing fee of \$305.00.

3. Amend the Unlawful Presence Policy for Adjustment Applicants

Under current USCIS interpretation, an adjustment applicant who departs the United States and returns on advance parole authorization triggers the 3-year or 10-year bar unlawful presence ground of inadmissibility. Because USCIS generally issues advance parole for adjustment applicants liberally and the fee for the advance parole document is now included with the fee for adjustment of status, the public perceives that: 1) USCIS authorizes the departure of such alien and 2) USCIS deceives individuals into triggering their own inadmissibility.

To address these issues, OP&S is currently examining the feasibility of policy options so that individuals would not be deemed to have triggered the bar upon departure with prior authorization from DHS. The options include possibilities reexamining past interpretations of terms such as "departure" and "seeking admission again" within the context of unlawful presence and adjustment of status.

Implementation Method: Interim Policy Guidance; Rulemaking

Resources/Considerations: Coordination with DHS.

Target Date: September/October 2010 (Policy Guidance); June/July 2011 (Rulemaking)

4. Lessen the Standard for Demonstrating "Extreme Hardship"

DRAFT -- Immigration Administrative Relief Options
Page 5

The Act at 212(a)(9)(B)(i)(I) and (II) renders inadmissible for 3 or 10 years individuals who have been unlawfully present in the U.S. for 180 days or one year, respectively, and then depart. By statute, DHS has discretion to waive these grounds of inadmissibility for spouses, sons and daughters of U.S. citizens or lawful permanent residents if the refusal to admit such individuals would result in extreme hardship to their qualifying relatives. Generally, the "extreme hardship" standard has been narrowly construed by USCIS.

To increase the number of individuals applying for waivers, and improve their chances for receiving them, CIS could issue guidance or a regulation specifying a lower evidentiary standard for "extreme hardship." This would promote family unity, and avoid the significant human and financial costs associated with waiver denial decisions born of an overly rigid standard. This revised standard would also complement expanded use of PIP as set forth in B.

5. Publish final regulations related to relief for unaccompanied minors, and for victims of human trafficking, domestic violence, and other criminal activities

These rules would help regularize the immigration status of minors in foster care or in the process of being adopted. They would further clarify the derivative family members for whom a victim of human trafficking can petition, implement provisions allowing such individuals to enter the U.S. based on the danger of retaliation, and establish procedures for victims of elder abuse to seek relief.

Implementation method: Proposed and interim final regulations.

Resources/considerations: Coordination necessary with various federal agencies, including DOJ and DOS.

Target delivery date: FY10-FY11

B. To Foster Economic Growth

1. Partner with Department of Commerce (DOC) to administer the EB-5 Immigrant Investor Program

The EB-5 program allows certain aliens who have made investments in US businesses and who created at least ten jobs to obtain LPR status. Due to a number of factors, the EB-5 program has been under utilized and, as a result, job creation under this program has been limited. USCIS views the EB-5 program as an important tool in assisting the U.S. economy as our country continues to recover from the recent recession. Currently, an opportunity exists for USCIS and the DOC to work together in promoting the EB-5 Immigrant Investor Pilot Program (Pilot Program). The goals of the Pilot Program and the goals of certain DOC components, such as *Invest in America*, seem to provide a natural starting point for agency collaboration. OPS proposes setting up a working group with the DOC to determine how DOC might assist USCIS

DRAFT -- Immigration Administrative Relief Options
Page 6

in making the EB-5 program more accessible to foreign investors through administrative efficiencies and promotion.

Implementation Method: Working group sessions between DOC and USCIS. ~~Prohibit~~ rulemaking to codify joint administration of the EB-5 Program once parameters are agreed upon between the two agencies.

Resources/Considerations: DHS and USCIS leadership agree that the partnership with DOC would be beneficial to USCIS as well as the EB-5 stakeholder community. Need to coordinate with DOC.

Target Date: To be determined. [We can begin cooperating with Invest in America immediately.] ~~Allow~~ 3-9 months so that the low hanging fruit can be harvested first.

2. Expand the Dual Intent Doctrine

Most non-immigrants who apply for adjustment of status are presumed to be intending immigrants and are no longer eligible to maintain nonimmigrant status. Section 214(b) of the Act permits H-1 temporary workers in specialty occupations, L-1 intra-company managerial or executive transferees, and their spouses and children to maintain their nonimmigrant status while their adjustment applications are pending.

USCIS should consider expanding the dual intent concept to cover other long-term non-immigrants, including F, O, TN, P, and E visa holders. These long-term non-immigrants often need to make short overseas travels during their authorized stay. Under the "dual intent" doctrine, these non-immigrants would be able to maintain valid nonimmigrant status and travel overseas without advance parole while their adjustment applications are pending. They would also be allowed to maintain their nonimmigrant status if USCIS denies their adjustment applications.

Implementation Method: NPRM.

Resources/Considerations: Coordinate with other DHS components and DHS Headquarters as well as the Department of State.

Target Date: Minimum of 12 months to issue final rule.

3. Extend employment authorization to H-4 dependent spouses of H-1B principals where the principals are also applicants for lawful permanent residence under AC 21.

USCIS Senior Leaders have already approved this course of action; it is therefore recommended in the context of identifying administrative relief options that their decision be communicated to the Department of Homeland Security and to the White House.

Implementation Method: Notice of Proposed Rulemaking (NPRM).

DRAFT -- Immigration Administrative Relief Options
Page 7

Resources/Considerations: Coordinate with DHS Policy and White House prior to rule drafting. USCIS systems (CLAIMS, etc.) will need to be modified to accommodate EADs for this group of H-4s.

Target Date: Minimum of 12 months to issue final rule.

4. Expand existing "grace periods" to depart the U.S. for E-1, E-2, E-3, H-1B, H-1B1, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, Q, R, and TN workers and their dependents.

Non-immigrant workers whose period of employment authorization has expired should be afforded a reasonable period of time to conclude their affairs and leave the U.S. The current 10-day "grace period" for departure is insufficient and should be expanded by regulation to permit between 30-90 days for departure depending on employment category and length time the individual has been authorized to work in the U.S. Proposed H-2A regulations recognize this problem and include a 30-day period of authorized stay after the H-2A employment period expires.

Implementation Method: NPRM

Resources/Considerations: Coordinate within other DHS components

Target Date: Minimum of 12 months to issue final rule.

C. To Achieve Process Improvements

1. Expand the Availability of Premium Processing Service

Expand availability of premium processing service to additional employment-based classifications (specify which ones need to be added, to include applications to change or extend nonimmigrant status, applications for employment authorization and advance parole, and all employment-based immigrant petitions, etc.). We have no backlogs now, and we can do it operationally.

Implementation Method: Federal Register Notice (for classifications not previously designated as eligible for Premium Processing Service), and website posting and update to "turn on" Premium Processing Service availability for classifications previously designated by Federal Register Notice as eligible for Premium Processing Service.

Resources/Considerations

Target Date: immediate for classifications previously designated as eligible for Premium Processing Service. For classifications which have not been previously designated, a Federal Register Notice will need to be published, which could take 60-90 days.

2. Implementation of the Validation Instrument for Business Enterprises (VIBE) Program

DRAFT -- Immigration Administrative Relief Options

Page 8

VI31 is a web-based tool for adjudicators that will enable USCIS to independently validate the viability and current level of business operations of companies, and organizations filing employment-based immigrant and nonimmigrant petitions.

By providing information about a petitioning company/organization's level of business operations, VI31 will enhance USCIS' ability to more easily distinguish eligible petitioners from those that are ineligible and/or fraudulent.

VI31 is expected to eventually lessen the need for petitioners to repeatedly submit voluminous paper documentation to establish petitioner viability. Thus, in turn, will likely reduce the number of RFEs issued to otherwise eligible petitioners.

Additionally, by providing the same operational information to all four Service Centers, VI31 will promote consistency in the adjudication of employment-based immigrant and nonimmigrant petitions. Overall, the additional information provided by VI31 will improve the integrity of employment-based immigrant and nonimmigrant programs which will ultimately provide eligible petitioners greater access to legal foreign workers.

Implementation Method: USCIS Update and pre-implementation stakeholder meeting.

Resources/Considerations: Coordinate with OIT and other USCIS Offices

Target Date: Spring/Summer 2010.

2. H-2B Cap Allocation Options

An options paper has been prepared by USCIS which discusses alternative ways to distribute the limited number of H-2B cap numbers available per fiscal year.

Currently, the Statute requires that H-2B cap numbers be allocated semi-annually, with 33,000 visa numbers allocated during the first six months of the fiscal year, and 33,000 allocated during the last six months of the fiscal year. Options include a quarterly distribution, a monthly distribution, or a "peak period" distribution. Options are currently under review within USCIS and DHS. USCIS will likely seek to hold public engagement events to solicit ideas from stakeholders.

Implementation Method: No regulation required. Consultation with H-2B stakeholders recommended prior to any decision being made.

Resources/Considerations: Coordinate with other DHS components and the Department of State.

Target Date: Implementation in six months.

3. Automatic Extension of Employment Authorization Documents (EADs)

Permit an automatic extension of EADs for up to 240 days when an application to extend the EAD has been filed prior to its expiration. We currently permit this for nonimmigrant worker visa petitions. (SCOPS)

Implementation Method: No rulemaking required. Operational changes will be necessary to implement.

Resources/Considerations: Coordinate with DHS and conduct outreach with stakeholders.

DRAFT -- Immigration Administrative Relief Options
Page 9

Target Date: 60 to 90 days

4. 2-year EADs - Issue Employment Authorization Cards valid for 2 years in wider circumstances. (SCOPS)

Implementation Method: No rulemaking required

Resources/Considerations: Coordinate with DHS.

Target Date: 60 to 90 days. SCOPS should weigh in here.

5. Reengineering of Civil Surgeon Process

USCIS proposes to implement a new process to govern the designation and revocation of civil surgeons, who are physicians authorized to conduct legally required medical examinations of aliens applying for certain immigration benefits. The new process would:

- Create uniform standards and procedures for civil surgeon designation and revocation.
- Designate an application form, a fee for civil surgeon designation, and a centralized civil surgeon processing center.
- Require civil surgeons to be board certified in their medical specialty.
- Authorize blanket designations for health departments and Armed Forces physicians in certain circumstances.
- Grant the USCIS Director authority to designate civil surgeons in emergent or unforeseen circumstances.

The new process would enhance the caliber of civil surgeons, improve the quality of immigrant medical examinations, and strengthen DHS' commitment to safeguarding public health

Implementation Method: Rulemaking

Date: June 2011

Resources/Considerations: Coordinate with DHS and Health and Human Services.

Target:

6. Internal Policy Review & Enhancement

U.S. Citizenship and Immigration Services (USCIS) currently provides policy guidance as memoranda, standard operating procedures (SOP), manuals, and training materials. Inconsistent interpretation and application of guidance and the lack of a central reference point for internal and external stakeholders often results in disconnected information and lack of transparency. Local and national policy guidance within USCIS is distributed across multiple sources, such as the USCIS intranet, an internal version of the Adjudicator's Field Manual, training materials, and the i-link reference disk. This creates a tremendous burden for USCIS employees and the public in trying to access relevant information.

DRAFT — Immigration Administrative Relief Options
Page 10

To address these issues, USCIS has prioritized a comprehensive review of all policy documents to ensure that guidance is consistent throughout the Agency. The review will examine all existing policy within the Agency and provide access to the most up-to-date guidance to both internal and external stakeholders. Once the policy guidance is reviewed and revised, it will be posted on a central and searchable web-based repository.

Implementation Method: Rulemaking

Resources/Considerations: USCIS Working Groups, USCIS Senior Policy Council

Target Date: Incremental implementation. All USCIS policies reviewed and enhanced by June 2012.

D. To Protect Certain Individuals or Groups from the Threat of Removal

1. Increase the Use of Deferred Action

For individuals already admitted to the U.S. (and therefore ineligible for PIP), USCIS can increase the use of deferred action. Deferred action is an exercise of prosecutorial discretion not to pursue removal from the U.S. of a particular individual for a specific period of time.² A grant of deferred action does not confer any immigration status, nor does it convey or imply any waivers of inadmissibility that may exist. Likewise, deferred action cannot be used to establish eligibility for any immigration benefit that requires maintenance of lawful status. Periods of time in deferred action do, however, qualify as periods of stay authorized by the Secretary of DHS for purposes of sections 212(a)(9)(B) and (C) of the Act, and may be extended indefinitely. Individuals who have been granted deferred action may apply for employment authorization. Within DHS, USCIS, Immigration and Customs Enforcement, and Customs and Border Protection all possess authority to grant deferred action.

USCIS has previously allowed the use of deferred action to provide relief to non-immigrants whose periods of admission had expired, or otherwise had failed to maintain lawful immigrant status. In the aftermath of Hurricane Katrina, USCIS instituted a policy of deferred action for non-immigrants impacted by this natural disaster. USCIS has also granted deferred action for particular groups including applicants for interim relief related to the U visa program. Most recently, the SPC approved the use of deferred action for certain military dependents for whom a visa number is not currently available and who are ineligible for PIP.

While it is theoretically possible to grant deferred action to an unrestricted number of unlawfully present individuals, doing so would likely be controversial, not to mention expensive. Presently no specific application form or fee is required to request or receive deferred action. Were USCIS to increase significantly the use of deferred action, the agency would either require a separate

² See, US Citizenship and Immigration Services, *Adjudicator's Field Manual*, at section 40.9.2(a)(3)(i), added May 6, 2009. Factors to be considered in evaluating a request for deferred action are also discussed in the November 17, 2000 memorandum entitled "Exercising Prosecutorial Discretion" by former Immigration and Naturalization Services Commissioner, Doris Meissner at footnote 1.

DRAFT -- Immigration Administrative Relief Options
Page 11

appropriation or independent funding stream.³ Alternatively, USCIS could design and seek expedited approval of a dedicated deferred action form and require a filing fee.

Rather than making deferred action widely available to hundreds of thousands and as a non-legislative version of "amnesty", USCIS could tailor the use of this discretionary option for particular groups such as individuals who would be eligible for relief under the DREAM Act (an estimated 50,000), or under section 249 of the Act (Registry), who have resided in the U.S. since 1996 (or as of a different date designed to move forward the Registry provision now limited to entries before January 1, 1972).

2. Issue NTAs Strategically to Promote DHS Priorities

Under Policy Memorandum 110 (attached) USCIS issues NTAs for denied cases where such issuance is prescribed by regulation. This includes, but is not limited to, denials of the Form I-751 Petition to Remove Conditions on Residence; Form I-829, Petition by Entrepreneur to Remove Conditions; and Form I-817, Application for Family Unity Benefits. USCIS also issues NTAs for certain cases involving the termination of an alien's refugee status by the District Director. See 8 CFR 216.3(a), 8 CFR 236.14(a)(1)(i), and 8 CFR 207.9.

Aside from these situations, USCIS has discretion regarding whether or not to issue NTAs. In practice, and in accordance with the spirit of Policy Memorandum 110, the agency typically issues NTAs for any/all denial decisions without weighing the likely impact on the applicant or the Executive Office for Immigration Review.

To promote the expressed priorities of ICE's Secure Communities Initiative (attached) regarding increased docket efficiency and a focus on individuals who pose a danger to the community, USCIS should issue NTAs strategically, rather than across the board. If relief is potentially available in removal, USCIS should consider issuing an NTA. On the other hand, where no relief exists in removal for an applicant without any significant negative immigration or criminal history, USCIS should avoid using its limited resources to issue an NTA. Denied cases should, however, be referred to ICE given that agency's enforcement responsibilities.

³ Under Sections 262, 263, and 264 of the Act, USCIS may develop and implement a registration program for individuals who are unlawfully present in the U.S. The goal of such a program could be to offer potential discretionary relief options including deferred action while simultaneously gathering basic biometric data and conducting comprehensive security checks.